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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92054201
Party	Defendant Sleep Innovations, Inc.
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Date	09/17/2012
Attachments	Declaration of Robert W. Smith.pdf (4 pages)(149626 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Registration No. 3,916,902
For the Mark: BODIPEDIC (& Design)
Registration Date: February 8, 2011

DAN FOAM APS)	Cancellation No. 92054201
)	
Petitioner,)	
)	
v.)	
)	
SLEEP INNOVATIONS, INC.,)	
)	
Registrant.)	

**DECLARATION ROBERT W. SMITH IN OPPOSITION TO PETITIONER'S
MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF
REGISTRANT'S CROSS-MOTION FOR SUMMARY JUDGMENT**

ROBERT W. SMITH, being of full age, hereby declare as follows:

1. I am an attorney at law of the State of New Jersey and am a member of the firm of McCarter & English, LLP, counsel for Registrant Sleep Innovations, Inc. ("Registrant" or "SI"). I submit this Declaration in opposition to Petitioner Dan Foam ApS' ("Petitioner") Motion for Summary Judgment (the "Motion") in this matter and in support of Registrant's Cross-Motion for Summary Judgment.

2. Attached hereto as Exhibit A is a true and correct copy of U.S. Registration No. 3,916,902 for the BODIPEDIC & Design mark ("Registrant's Mark"), which Petitioner seeks to cancel in this proceeding. Petitioner did not object to registration of Registrant's Mark and Petitioner's TEMPUR-PEDIC and Design mark, which is the subject of U.S. Registration No. 3,900,919, was not cited as an obstacle by the Patent and Trademark Office (the "PTO").

3. Attached hereto as Exhibit B is a true and correct copy of U.S. Registration No. 3,137,309 for the BODIPEDIC word mark. Registrant owns this mark by way of recorded assignment. A true and correct copy of that assignment is included in Exhibit B.

4. Attached hereto as Exhibit C is a true and correct copy of U.S. Registration No. 3,900,919 for Petitioner's TEMPUR-PEDIC & Design mark.

5. Attached hereto as Exhibit D are true and correct copies of certificates of registration obtained from the PTO electronic database for PEDIC-formative marks in connection with goods in Class 20 and related classes.

6. Attached hereto as Exhibit E are true and correct copies of certificates of registration obtained from the PTO's electronic database for reclining figure design marks in connection with goods in Class 20.

7. Attached hereto as Exhibit F is a true and correct copy of a subpoena directed to Overstock.com, Inc., and issued by counsel for petitioner in this proceeding on February 2, 2012 (the "Subpoena").

8. During the course of discovery, counsel for Petitioner served several third party subpoenas without providing notice of the subpoenas to Registrant. Registrant learned about all of these subpoenas, other than the Subpoena to Overstock.com, when the subpoenaed third parties contacted Registrant upon receipt of such subpoenas. In each case, other than Overstock.com, Registrant undertook representation of the subpoenaed third parties in connection with the subpoenas.

9. Attached hereto as Exhibit G is a true and correct copy of a letter from counsel for Registrant to counsel for Petitioner, dated February 7, 2012.

10. Attached hereto as Exhibit H is a true and correct copy of a letter from Overstock.com, Inc. to counsel for Petitioner, dated February 10, 2012.

11. Attached hereto as Exhibit I is a true and correct copy of a letter from counsel for Petitioner to counsel for Registrant, dated February 14, 2012.

12. Registrant did not receive notice of the Subpoena until February 14, 2012, when counsel for Petitioner served Registrant with both a copy of the Subpoena and copies of the documents produced by Overstock.com on February 10, 2012, in response to the Subpoena.

13. Petitioner did not serve a copy of the Declaration of Krysta Pecharich, dated February 23, 2012 and included as part of Exhibit S to Petitioner's Brief in support of the Motion, until Petitioner served Registrant with the Motion papers on August 2, 2012.

14. Attached hereto as Exhibit J is a true and correct copy of an excerpt from the deposition of Sharon Miller, taken in this proceeding on March 30, 2012, portions of which have been designated as "Confidential" and "Highly Confidential—Attorneys' Eyes Only" pursuant to the Stipulated Protective Order entered in this proceeding. As such, Exhibit J is filed under seal.

15. Attached hereto as Exhibit K is a true and correct copy of an excerpt from the deposition of Registrant's Rule 30(b)(6) witness, Lisa Thorstenson, taken in this proceeding on March 30, 2012, portions of which have been designated as "Confidential" and "Highly Confidential—Attorneys' Eyes Only" pursuant to the Stipulated Protective Order entered in this proceeding. As such, Exhibit K is filed under seal.

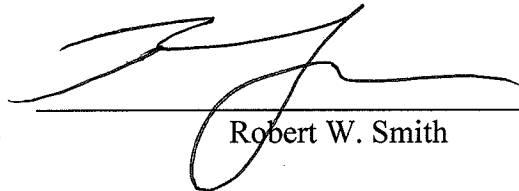
16. Attached hereto as Exhibit L is a true and correct copy of an excerpt from the deposition of Petitioner's Rule 30(b)(6) witness, Daniel Setlak, taken in this proceeding on May 15, 2012, portions of which have been designated as "Confidential" and "Highly Confidential—Attorneys' Eyes Only" pursuant to the Stipulated Protective Order entered in this proceeding.

Exhibit L also includes a true and correct copy of Exhibit 14, which was produced by Petitioner during discovery and marked as an exhibit during Mr. Setlak's deposition. This document has been designated by Petitioner as "Highly Confidential –Attorneys' Eyes Only" As such, Exhibit L is filed under seal.

17. The deadline in this proceeding for the parties to make expert disclosures was April 11, 2012. Petitioner did not make any expert disclosure and did not serve any likelihood of confusion survey evidence in this proceeding.

I declare that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: September 17, 2012



Robert W. Smith